IN THE SUPREME COURT OF CALIFORNIA

ROBIN TYLER et al.,

Petitioners.

v.

THE STATE OF CALIFORNIA et al.,

Respondents;

DENNIS HOLLINGSWORTH et al.,

Interveners.

S168066

REPLY BRIEF OF THE TYLER-OLSON PETITIONERS REGARDING ISSUES SPECIFIED IN THE SUPREME COURT'S ORDER FILED NOVEMBER 19, 2008

GLORIA ALLRED, Bar No. 65053
MICHAEL MAROKO, Bar No. 62013
JOHN S. WEST, Bar No. 102034
ALLRED, MAROKO & GOLDBERG
6300 Wilshire Boulevard, Suite 1500
Los Angeles, CA 90048
Tel: (323) 653-6530
Fax: (323) 653-1660
Attorneys for Petitioners
ROBIN TYLER and DIANE OLSON,
CHERI SCHROEDER and
COTY RAFAELY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

I. INTRODUCTION

Although arising in the context of the Proposition 8 ban on same sex marriage, this challenge is as much about the sanctity of our constitution as it is about an individual's "inalienable" right to marry the person of his or her choice. Proposition 8 presents a textbook example of the potentially devastating consequences to the fundamental human rights enshrined in our Constitution when an improperly narrow view of the term constitutional "revision" is utilized.

Just a few months before Proposition 8 was adopted, the Supreme Court issued its historic In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008) opinion, which recognized the fundamental right of an individual to marry the person of his/her choice (same sex marriage). Even the opponents of same sex marriage must concede that when the Supreme Court decided the Marriage Cases, it did so in the context of privacy, equal protection and liberty, three of the most fundamental human rights embodied in our state Constitution.

Unlike the vast majority of earlier cases in which initiatives were challenged, the Court is now called upon to determine the constitutional

implications of an initiative which purports to strip individuals of "inalienable" rights. For purposes of determining the constitutional effect (amendment or revision) of Proposition 8 upon our Constitution, this case also stands alone in that its impact falls exclusively upon the members of a group that the Supreme Court recently declared to be a suspect classification-homosexuals.

In response to this challenge to Proposition 8, the California Attorney General has, to his credit, agreed that Proposition 8 wrongfully strips specified individuals of the fundamental right to marry. On that point, there is no disagreement.

The Tyler-Olson Petitioners disagree, however, with the Attorney General's argument that Proposition 8 constitutes a mere amendment, as opposed to a revision to, the Constitution. As will be shown in this Reply, the Attorney General's analysis of what constitutes a "revision" of our Constitution is unduly restrictive, and his reliance upon cases which arose in the constitutional setting of changes to intricate property tax laws or arcane government contracting procedures is misplaced. [1]

---

[1] The Tyler-Olson Petitioners also disagree with the Attorney General's conclusion regarding whether Proposition 8 violates the separation of powers doctrine. See section II, infra.

This disagreement is not merely academic. The Attorney General's arguments would, if adopted by the Supreme Court, (1) enable a simple majority of the voters to take away fundamental and inalienable constitutional rights from minorities who have suffered a history of discrimination, or from members of unpopular segments of society, and (2) enable the initiative process to deprive the Supreme Court of the indispensable role in our governmental scheme as the guardian of the Constitution.

When the Supreme Court decided the Marriage Cases, it not only affirmed the right to marry as one of the basic, inalienable civil rights guaranteed by the California Constitution, it also held that the right to marry is "so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process." In that same decision, the Supreme Court squarely held that "sexual orientation [is] a suspect classification," and that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples violate equal protection under the California Constitution.

While the Attorney General cites many cases in which the Supreme Court upheld amendments to the Constitution that were challenged as

improper revisions, none of those cases dealt with an initiative that deprives a targeted and constitutionally suspect class of a basic human right, or of equal protection. To put it simply, none of the prior revision vs. amendment cases has even come close to dealing with an initiative like Proposition 8, which effectively says: "The equal protection clause is hereby abrogated with respect to the fundamental right of a constitutionally suspect class, homosexuals, to marry. The Supreme Court's designation of homosexuals as a suspect classification is of no force with respect to equal protection, and marriage is reserved for heterosexuals." That is the inevitable force and effect of Proposition 8.

It is beyond dispute that we live in a state where, under our Constitution, marriage is an inherent aspect of the inalienable right to privacy, where individuals are entitled to equal protection of the law, and where sexual orientation is a suspect classification for equal protection purposes. It is equally beyond dispute that as a result of Proposition 8, we currently live in a state where two classes of citizens are created for marriage purposes: (1) individuals who can marry the person of their choice (as long as that person is of the opposite sex) and (2) individuals who cannot marry the person of their choice (because that person is of the same sex , *i.e.*, homosexuals).

Proposition 8 deals a massive blow to equal protection of the law, one of the most basic precepts of our Constitution, and one of the most important of all rights. Moreover, that blow was directed squarely at a group that the Supreme Court declared to be a suspect classification-homosexuals. By its very nature, that kind of a blow is not a mere amendment to the Constitution.

The status of civil rights after Proposition 8 is incompatible with the constitutional scheme in place before the passage of that initiative. The difference amounts to a fundamental re-writing of the very core of our Constitution, and a restructuring of our fundamental governmental plan, which enables the Court to function as the guardian of constitutional rights.

In asking the Court to invalidate Petition 8, the Tyler-Olson petitioners are not suggesting that the Court be dismissive of the initiative process, or that the will of the majority (actually a very slight majority) should lightly be disregarded. Nor do the Tyler-Olson Petitioners suggest that it is commonplace for the Court to declare an initiative to be an improper revision of our state constitution. Such declarations are not commonplace. Nevertheless, there comes a time, perhaps once every generation, when the Supreme Court must act to preserve the very core of our constitution, and its own role as the interpreter of that constitution. The

Supreme Court did so recently in the Marriage Cases, and is now called upon to do so again in response to Proposition 8.

II. RESPONSE TO QUESTION NO.1: PROPOSITION 8 IS A REVISION OF OUR STATE CONSTITUTION

A number of cases have discussed the "amendment" vs. "revision" issue posed to the parties by the Supreme Court.[2] While the published opinions finding a permissible "amendment" of the constitution outnumber the published opinions finding an improper "revision," that numerical differential is of no legal significance. "Each situation involving the question of amendment, as contrasted with revision, of the Constitution must, we think, be resolved upon its own facts." McFadden v. Jordan, 32 Cal.2d 330, 348, 196 P.2d 787, 798 (1948).

---

[2] "[A]lthough the voters may accomplish an amendment by the initiative process, a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people." Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal.3d 208, 221, 149 Cal.Rptr. 239, 242 (1978). As noted in Amador Valley, "the Constitution itself does not specifically distinguish between revision and amendment." 22 Cal.3d at 222, 149 Cal.Rptr. at 243.

(A) In order to amount to a constitutional revision, a change need not involve widespread deletions, additions and amendments to the Constitution. Even a relatively simple enactment may have such far reaching effects as to amount to a revision.

The parties agree that a revision of our constitution cannot be accomplished by the simple initiative process. They disagree over whether Proposition 8 amounts to a revision, as opposed to an amendment, of the Constitution.

"[E]ven a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision." Amador Valley, supra, 22 Cal.3d at 223, 149 Cal.Rptr. at 244. "Whether an initiative constitutes an amendment or revision to the Constitution does not necessarily depend on the number of constitutional provisions it affects, but on the nature of the changes it makes." California Assn. of Retail Tobacconists v. State of California, 109 Cal.App.4th 792, 834, 135 Cal.Rptr.2d 224, 257 (2003). A "revision" does not require a quantitative revision of the Constitution. Legislature v. Eu, 54 Cal.3d 492, 506, 286 Cal.Rptr. 283, 290 (1991).

In McFadden v. Jordan, 32 Cal.2d 330, 350, 196 P.2d 787, 799 (1948), the Supreme Court found an initiative to be an improper

constitutional revision when the object of the initiative "would be to substantially alter the purpose and to attain objectives clearly beyond the lines of the Constitution as now cast." Citing McFadden and Amador, supra, the Raven Court found an improper revision of the constitution in an initiative that "substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections." 52 Cal.3d at 354, 276 Cal.Rptr. at 338.

(B) By abrogating an individual's inalienable right to marry the person of his choice, a right that is protected against abrogation by the state, Proposition 8 substantially alters the preexisting constitutional scheme and the basic governmental plan to promote marriage.

By eliminating the right of an individual to marry a person of the same sex, Proposition 8 strips homosexuals, who are members of a suspect classification, of the right to marry the persons of their choice, a crucial component of the inalienable right to privacy. Proposition 8 simultaneously strips those individuals of equal protection under the law, another bedrock principle of human rights embodied in our Constitution. Such drastic changes, which essentially carve homosexuals out of the core civil rights

embodied in the constitution, substantially alter the pre-existing constitutional scheme in such a way as to alter the basic governmental plan to promote marriage. Since those changes purport to take place in the immediate aftermath of the Supreme Court's Marriage Cases opinion, they also undermine the Court's role in our governmental scheme as the interpreter and guardian of the Constitution against attack from other branches of the government.

(1) **Even before the Marriage Cases decision, the right to marry was part of the basic fabric of constitutional rights. In the Marriage Cases, the Supreme Court recognized that homosexuals were just as entitled to that right as other members of society.**

The right to marry the person of one's choice (i.e., same sex marriage) originates in rights recognized long before the historic Marriage Cases opinion. The fundamental rights which ultimately led to the Marriage Cases are, without a doubt, part of the basic fabric of our constitution.

Before California's Constitution even embodied the right to privacy, the Supreme Court recognzied that "[m]arriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men." Perez v. Sharp, 32 Cal.2d 711, 714, 198 P.2d 17, 18 - 19 (1948). Perez discussed the right to marry in the context of the Fourteenth

Amendment because California's own Constitution did not yet contain a right to privacy.

In 1972, the right of "privacy" became part of the enumeration of "inalienable rights" in Article I, section 1 of the California Constitution. Subsequent decisions all confirm the fundamental right to marry as an aspect of the inalienable right to privacy. In 1985, the Supreme Court recognized that the "right to marriage and procreation [were] recognized as fundamental, constitutionally protected interests" which are encompassed among the inalienable right to privacy in section 1 of article I of the California Constitution. Conservatorship of Valerie N., 40 Cal.3d 143, 161, 219 Cal.Rptr. 387, 399 (1985).

For purposes of the "revision" vs. amendment" issue, it is important to note that in Ortiz v. Los Angeles Police Relief Ass'n, 98 Cal.App.4th 1288, 120 Cal.Rptr.2d 670 (2002), the Court of Appeal stated that "the Constitution undoubtedly imposes ***constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees***." 98 Cal.App.4th at 1302-3, 120 Cal.Rptr.2d at 677-8. (Emphasis added).

In the Marriage Cases decision, the Supreme Court made it clear that it was not creating any new right to "same sex marriage," and that it was

simply affording homosexuals the same right to marry as anyone else in this state. In re Marriage Cases 43 Cal.4th at 812, 76 Cal.Rptr.3d at 726 - 727.

In the Marriage Cases, the Supreme Court again confirmed that the right to marry "***embodies fundamental interests of an individual that are protected from abrogation or elimination by the state***. Because our cases make clear that the right to marry is an integral component of an individual's interest in personal autonomy protected by the privacy provision of article I, section 1, and of the liberty interest protected by the due process clause of article I, section 7, it is apparent under the California Constitution that the right to marry...has independent substantive content, and cannot properly be understood as simply the right to enter into such a relationship if (but only if) the Legislature chooses to establish and retain it." In re Marriage Cases, supra, 43 Cal.4th at 818-819, 76 Cal.Rptr.3d at 732. (Emphasis added)

In adopting Proposition 8, however, the electorate has abrogated an individual's constitutionally recognized fundamental right to marry the person of his/her choice, a right which has independent substantive content that cannot be abrogated.[3] That abrogation completely eliminates the right

[3] The power of the electorate in the initiative process is the constitutional power of the electors "to propose statutes . . . and to adopt or reject them" (Cal. Const., art. II, § 8, subd. (a)), and "is generally coextensive with the power of the Legislature to enact statutes." Santa Clara County Local Transportation Authority v. Guardino, 11 Cal.4th

of homosexuals to marry the persons of their choice, and is therefore a revision of the fabric of the Constitution.

(2) **As recognized in the Marriage Cases, promotion of marriage has for an extended time been part of our basic government plan.**

In the Marriage Cases, the Supreme Court not only recognized that a homosexual enjoys the same right to marry as any other individual, the Court also recognized the role of marriage in our governmental plan. Proposition 8 undermines that governmental plan.

On this subject, the Supreme Court in the Marriage Cases cited its own earlier decision in Baker v. Baker, (1859) 13 Cal. 87, 94, holding that "[t]he public is interested in the marriage relation and the maintenance of its integrity, as it is the foundation of the social system." The Marriage Cases also quoted extensively from Elden v. Sheldon, (1988) 46 Cal.3d 267, 275, 250 Cal.Rptr. 254, in which the Supreme Court affirmed that " '[m]arriage is accorded [a special] degree of dignity in recognition that "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime."'" 46 Cal.3d at pp. 274-275, 250 Cal.Rptr. 254, 758 P.2d 582.

220, 253, 45 Cal.Rptr.2d 207, 228 (1995).

In Elden v. Sheldon, the Supreme Court further explained: "The policy favoring marriage is 'rooted in the necessity of providing an institutional basis for defining the fundamental relational rights and responsibilities in organized society.' " 46 Cal.3d at p. 275. The Marriage Cases Court cited to Marvin v. Marvin, 18 Cal.3d 660, 683, 134 Cal.Rptr. 815, 831 (1976), in which the Court "recognize[d] the well-established public policy to foster and promote the institution of marriage" and went on to"point out that the structure of society itself largely depends upon the institution of marriage . . ." 18 Cal.3d at 684, 134 Cal.Rptr. at 831.

In the Marriage Cases, the Supreme Court also provided its own views on the role of marriage, noting "an overriding interest in the welfare of children," "the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents," and "the role of the family in educating and socializing children," which "serves society's interest." 43 Cal.4th at 815, 76 Cal.Rptr.3d at 729 - 730. On that basis, the Court affirmed "marriage as the 'basic unit' or 'building block' of society." Id.

The promotion of marriage is clearly part of the governmental plan of this State. Moreover, the Supreme Court has declared that in the governmental plan of this State, the right to marry the person of one's

choice is not subject to abrogation by other branches of government. 43 Cal.4th at 818-819, 76 Cal.Rptr.3d at 732. Since Proposition 8 would clearly strip the right to marry from one targeted group in derogation of the policy promoting marriage, that initiative alters the fundamental plan of the government in this State.

(3) Equal Protection is part of the core of our governmental plan and of our State Constitution. Proposition 8 rewrites the Equal Protection Clause, and our government plan, to the detriment of a targeted and suspect class.

Although the Marriage Cases decision is of a recent vintage, its roots run down to the deepest, and oldest, human rights core of our state Constitution. The California Constitution contains its own Equal Protection provision in Article I, Section 7, which provides: "A person may not be . . . denied equal protection of the laws . . . " Equal protection of the laws means " ' "that no person or class of persons shall be denied the same protection of the laws [that] is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property and in their pursuit of happiness." [Citation.]'" People v. Guzman, 35 Cal.4th 577, 591, 25 Cal.Rptr.3d 761, 771 (2005).

"Equal protection of the law is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all-the least deserving as well as the most virtuous." Agnew v. Superior Court In and For Los Angeles County, 118 Cal.App.2d 230, 234, 257 P.2d 661, 663 (1953).

In the Marriage Cases, the Supreme Court held that "sexual orientation should be viewed as a suspect classification for purposes of the California Constitution's equal protection clause and that statutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny under this constitutional provision." 43 Cal.4th at 840-841, 76 Cal.Rptr.3d at 751. As noted above, the Court also held that marriage is a fundamental right, and that a distinction in the right to marry between same sex couples and opposite-sex couples violates the Equal Protection Clause.

The effect of Proposition 8 upon our Equal Protection clause is dramatic. Before Proposition 8 was enacted, our Constitution's Equal Protection Clause meant that a "person may not be . . . denied equal protection of the laws . . . " Following Proposition 8, Article I, section 7 has effectively been re-written to say that "no one shall be denied equal

protection of the laws, with the exception of homosexuals in the context of the fundamental right to marry; they shall have no equal protection rights whatsoever. " Such a re-writing of a core constitutional value is a revision of our constitution.

There is, of course, a right to equal protection under the Fourteenth Amendment to the United States Constitution. Our courts analyze Article I, Section 7 of the California Constitution in a manner similar to the federal courts. In re Jose Z., 116 Cal.App.4th 953, 960, 10 Cal.Rptr.3d 842, 847 (2004).

A decision of the United States Supreme Court illustrates the effective re-writing of Article I, Section 7 of our State Constitution. In Romer v. Evans, 517 U.S. 620, 623-624, 116 S.Ct. 1620, 1623 (1996), the Supreme Court used the equal protection clause to void an "amendment" to the Colorado State Constitution ("Amendment 2") which, by its terms, repealed ordinances that prohibited discrimination on the basis of sexual orientation and which also prohibited all legislative, executive or judicial action designed to protect homosexuals. The United States Supreme Court's views on the role of equal protection in our society could have been written with California's Proposition 8 in mind:

"It is not within our constitutional tradition to enact laws of this sort. . . . [L]aws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense . . . [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer v. Evans, 517 U.S. at 633-635, 116 S.Ct. at 1628 - 1629.

Following the passage of Proposition 8, there is an irreconcilable constitutional conflict in the law concerning the right to marry. While our state Constitution still contains an Equal Protection Clause, new section 7.5 (Proposition 8) restricts marriage to opposite sex couples, and necessarily bars homosexual couples from marriage. "A statute that limits marriage to a union of persons of opposite sexes, thereby placing marriage outside the reach of couples of the same sex, unquestionably imposes different treatment on the basis of sexual orientation." In re Marriage Cases 43 Cal.4th at 839-840, 76 Cal.Rptr.3d at 750.

Thus, under Proposition 8, a suspect classification, homosexuality, is the basis for excluding individuals from a fundamental right. In other

words, one of our core constitutional provisions has been revised, and the role of our Constitution in our governmental plan has been revised.

(4) Proposition 8 intrudes and undermines the Supreme Court's role as the guardian of core constitutional values against encroachment by other branches of government. That elimination amounts to a change in the governmental plan.

The effect of Proposition 8 must be considered in the context of the Supreme Court's unique role as the guardian of the constitution against overreaching by other branches of the government. "The separation of powers doctrine articulates a basic philosophy of our constitutional system of government; it establishes a system of checks and balances to protect any one branch against the overreaching of any other branch. (See Cal.Const., arts. IV, V and VI; The Federalist, Nos. 47, 78 (1788).) Of such protections, probably the most fundamental lies in the power of the courts to test legislative and executive acts by the light of constitutional mandate and in particular to preserve constitutional rights, whether of individual or minority, from obliteration by the majority." Bixby v. Pierno, 4 Cal.3d 130, 141, 93 Cal.Rptr. 234, 241 (1971). Indeed, the genius of our legal system is that a single case, like the Supreme Court's recent decision in the Marriage Cases, can serve as a bulwark to preserve fundamental rights against the

onslaught of public opinion.[4]

"From its inception, the California Constitution has contained an explicit provision embodying the separation of powers doctrine. (Citation omitted) Article III, section 3, provides: 'The powers of State government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.'" Superior Court v. County of Mendocino, 13 Cal.4th 45, 52, 51 Cal.Rptr.2d 837, 841 (1996). In that governmental plan, the Supreme Court of California is the final arbiter of the meaning of state constitutional provisions. Sands v. Morongo Unified School Dist., 53 Cal.3d 863, 902-903, 281 Cal.Rptr. 34, 59 (1991).

In its role as the final arbiter of the constitution, the California Supreme Court held in the In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008) decision that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples and exclude the latter from access to the designation of marriage are unconstitutional.

---

[4] This is far more than an academic concern. In 1978, the so-called Briggs Initiative came before the electorate as Proposition 6. That initiative called for the firing of any school employee who was found to be "advocating, soliciting, imposing, encouraging, or promoting private or public homosexual activity directed at, or likely to come to the attention of schoolchildren and/or other employees." While that measure was fortunately defeated, it demonstrates the ongoing need for the Court to act as the guardian of constitutional protections for minorities.

According to the Supreme Court, the "right to marry must be understood to encompass the core set of basic substantive legal rights and attributes traditionally associated with marriages that are so integral to an individual's liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process." 43 Cal.4th at 781, 76 Cal.Rptr.3d at 700.

Proposition 8, if allowed to stand, would not only revise the Equal Protection clause, it would also eviscerate the holding that homosexuals are a suspect classification, that marriage is a fundamental right of every person, that marriage definitions which distinguish between same sex couples and opposite sex couples are unconstitutional, and that in the structure of our government, the right to marry cannot be abrogated legislatively. Unless Proposition 8 is overturned, the electorate and Legislature will be able to exercise a veto over the Court's role as the ultimate guardian of the constitution. Proposition 8 therefore works a constitutional revision, in the form of a fundamental change in the checks and balances of our governmental plan.

(C) Since Proposition 8 does not comport with the definition of an "amendment," it is a revision.

Another way to approach this question is to ascertain whether Proposition 8 meets the definition of an "amendment" of the Constitution. In Rippon v. Bowen, 160 Cal.App.4th 1308, 1313, 73 Cal.Rptr.3d 421, 425 (2008), the court held that an """[a]mendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."""

Proposition 8 certainly does not effect an improvement upon the constitutional rights of privacy and equal protection embodied in our constitution. To the contrary, Proposition 8 strips a suspect class of equal protection, and denies homosexuals fundamental liberties otherwise enshrined in our Constitution.[5] Since Proposition 8 reduces constitutional protections, and is contrary to the fundamental purposes underlying those protections, the initiative clearly amounts to a revision of the constitution.

---

[5] At pages 27-28 of his brief, the Attorney General argues that there is no denial of rights because homosexuals can continue to avail themselves of rights under the Domestic Partnership Act. In the Marriage Cases, however, the Supreme Court held that "affording same-sex couples access only to the separate institution of domestic partnership, and denying such couples access to the established institution of marriage, properly must be viewed as impinging upon the right of those couples to have their family relationship accorded respect and dignity equal to that accorded the family relationship of opposite-sex couples." In re Marriage Cases, 43 Cal.4th at 845, 76 Cal.Rptr.3d at 755.

(D) The cases relied upon by the Attorney General on the initiative vs. amendment issue are distinguishable.

In his brief, the Attorney General cites various cases in support of his argument that Proposition 8 is merely a permissible amendment, rather than an impermissible revision, of our Constitution. As will be shown, while the cases he cited may be correct statements of the law pertaining to the various measures under consideration, those cases are highly distinguishable from the pending challenge to Proposition 8.

In Amador Valley Joint Union High School District v. State Board of Equalization, 22 Cal.3d 208, 149 Cal.Rptr. 239 (1978), the Supreme Court considered whether a 1978 initiative called "Proposition 13" was a constitutional amendment or a revision. Proposition 13 added a section to the Constitution which limited the tax rate and assessed value of real property, limited the method for changing property taxes, and restricted local taxes on real property. After examining the qualitative effect of the Proposition 13 changes to the detailed tax provisions of the Constitution, the Court concluded that the initiative was no more than an amendment.

Amador is easily distinguished because (1) the initiative disclosed no intent to undermine "preexisting constitutional provisions," 22 Cal.3d at 225, 149 Cal.Rptr. at 245, (2) the initiative at issue did not affect any

vested, fundamental, inalienable constitutional rights of an individual, and (3) the changes to the property tax assessment laws did not change the fabric of our Constitution. There was no pre-existing fundamental inalienable right to a particular tax scheme, so that case is easily distinguished from the present case.

People v. Frierson, 25 Cal.3d 142, 158 Cal.Rptr. 281 (1979) is also distinguishable. In that case, the Court addressed whether Article I, section 27 was an amendment or revision to the Constitution. The challenged provision declared that the death penalty shall not be deemed to be infliction of cruel or unusual punishment for purposes of the State Constitution.

The Supreme Court found that Article I, section 27 imposed no changes in the nature of the basic governmental plan because the Court's own role as the guardian of constitutionality in any particular case remained intact. "As we have explained, we retain broad powers of judicial review of death sentences to assure that each sentence has been properly and legally imposed."25 Cal.3d at 187, 158 Cal.Rptr. at 307.

In People vs. Frierson, the Court could still invalidate any death sentence following the adoption of Article I, section 27 because its role as the guardian of the Constitution remained unchanged. Article I, section 27

simply meant that the death penalty was not automatically cruel and unusual. Conversely, Proposition 8 undermines the Supreme Court completely, and eliminates the Court's ability to safeguard same sex marriage. Thus, Proposition 8 not only contradicts the holdings in the Marriage Cases, it also seals the subject of same sex marriage off from the protection of the Court. That elimination of the Court from its role as the protector of the Constitution, coupled with the gutting of the equal protection clause as it relates to homosexuals, amounts to a constitutional revision.

In Brosnahan v. Brown, 32 Cal.3d 236, 186 Cal.Rptr. 30 (1982), the Supreme Court found that an initiative called "The Victims' Bill of Rights" , which imposed changes in the criminal justice system for the purpose of protecting the rights of crime victims, was an amendment of the Constitution. While that initiative added a provision to the Constitution, it did not do away with core fundamental civil liberties. Instead, it added constitutional rights for crime victims and for students at public schools, it modified the factors to be considered in granting bail, it modified certain criminal defenses and evidentiary doctrines, and it made changes to assorted Penal and Evidence Code sections. Unlike Proposition 8, the Victims' Bill of Rights did not eviscerate any individual's core constitutional rights or

bypass the Court's role as the guardian of the Constitution.

Legislature v. Eu, 54 Cal.3d 492, 286 Cal.Rptr. 283 (1991) involved challenges to term limits and budgetary limits imposed by Proposition 140. The petitioners speculated that the term limits would render the Legislature unable to discharge its traditional duties, thereby effecting a change in the structure of government. They also argued that the budgetary limitations would cause staff cuts, making the Legislature dependent on lobbyists for information. The Supreme Court held that the initiative constituted an amendment because (1) on its face, Proposition 140 did not affect either the structure or powers of the Legislature, and (2) the alleged consequences to our governmental scheme were "largely speculative ones, dependent on a number of as yet unproved premises." 54 Cal.3d at 509, 286 Cal.Rptr. at 292. There was no reduction in any inalienable fundamental civil right, no contradiction of Court holdings, and no diminishing of the Court's role as guardian of the Constitution.

Professional Engineers in California Government v. Kempton, 40 Cal.4th 1016, 56 Cal.Rptr.3d 814 (2007) dealt with an initiative which allowed public agencies to contract with private entities for particular kinds of services. According to the Supreme Court, Proposition 35 did not work a change in the plan of the government because it did "not usurp the

Legislature's plenary authority to regulate private contracting by public agencies in a global sense, but simply permits public agencies to enter into contracts with private entities for architectural and engineering services without article-VII derived restrictions on their ability to do so." 40 Cal.4th at 1047, 56 Cal.Rptr.3d at 837 Moreover, the Court observed that "even under our construction of Proposition 35, the Legislature retains some authority as defined in section 5 to amend the initiative by statute." Id. That case is completely unlike the present challenge to Proposition 8.

The Attorney General cited only one current case, Bowens v. Superior Court, 1 Cal.4th 36 (1991), in which modifications by initiative to equal protection rights were upheld. In Bowens, the Supreme Court dealt with procedural rights in a criminal case. The Court held that a criminal defendant who has been indicted is not entitled to a post-indictment preliminary hearing. That holding was based upon the effect of a constitutional provision enacted by an initiative, Proposition 115, which had the effect of abrogating an earlier Court opinion, Hawkins v. Superior Court, 22 Cal.3d 584, 150 Cal.Rptr. 435 (1978), regarding the right to a preliminary hearing post-indictment.

Proposition 115's abrogation of the holding in Hawkins did not amount to an improper revision of the Constitution because no fundamental,

inalienable personal rights were abrogated. Moreover, the very Hawkins opinion that was abrogated itself recognized the power of the Legislature to change the law in the area of criminal procedure. "***Until such time as the Legislature may prescribe other appropriate procedures***, the remedy most consistent with the state Constitution as a whole and least intrusive on the Legislature's prerogative is simply to permit the indictment process to continue precisely as it has, but to recognize the right of indicted defendants to demand a post indictment preliminary hearing prior to or at the time of entering a plea . . . Thus, while the Constitution authorizes the use of grand juries to indict criminal defendants, ***it leaves to the Legislature and the courts the task of developing procedures***, consistent with other state constitutional provisions, for implementing that mode of initiating prosecutions." Hawkins v. Superior Court, 22 Cal.3d at 593 -594 (1978). Conversely, the Court in the Marriage Cases expressly held that "right to marry...may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process." 43 Cal.4th at 781, 76 Cal.Rptr.3d at 700.

III. RESPONSE TO QUESTION NO.2: PROPOSITION 8 VIOLATES THE SEPARATION OF POWERS DOCTRINE

The Attorney General agrees with the proposition that the California Constitution embodies the separation of powers doctrine, and that persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.'" Superior Court v. County of Mendocino , 13 Cal.4th 45, 52, 51 Cal.Rptr.2d 837, 841 (1996). Although he agrees in principle with the rule that under the separation of powers doctrine, the Legislature may not readjudicate controversies that have been resolved in the courts, Superior Court v. County of Mendocino, 13 Cal.4th 45, 53, 51 Cal.Rptr.2d 837, 842 (1996), he argues that Proposition 8 does not violate the separation of powers doctrine. The Tyler-Olson Petitioners disagree on this point, and respectfully submit that the Attorney General has erroneously perceived the effect of Proposition 8.

The central issue is not whether the initiative process can be used to overturn particular rulings of a court. Cases have recognized the validity of such initiatives in appropriate cases. For example, "[t]he Legislature routinely 'enacts statutes that govern the procedures and evidentiary rules applicable in judicial and executive proceedings.'" Case v. Lazben Financial Co., 99 Cal.App.4th 172, 184, 121 Cal.Rptr.2d 405, 415 (2002).

There is, however, an outside limit to that power, and the separation of powers doctrine defines that limit. Proposition 8 is no mere enactment governing procedures and evidentiary rules. Putting aside its inherent revision of the Constitution, Proposition 8 abrogates the function of the judiciary.

Separation of powers doctrine is violated "when the actions of a branch of government defeat or materially impair the inherent functions of another branch." In re Rosenkrantz, 29 Cal.4th 616, 662, 128 Cal.Rptr.2d 104, 145 (2002). Thus, this discussion must begin with the core function of the judiciary.

"[T]he judiciary passes upon the constitutional validity of legislative and executive actions." Superior Court v. County of Mendocino, 13 Cal.4th 45, 53, 51 Cal.Rptr.2d 837, 841 (1996). "[T]he final responsibility for the interpretation of the law rests with the courts." Bates v. State Bd. of Equalization, 275 Cal.App.2d 388, 391, 79 Cal.Rptr. 837, 839 (1969). Thus, "the Legislature cannot 'interpret[ ]' a statute" and "cannot 'readjudicat[e]'or otherwise 'disregard' judgments that are already 'final.' " People v. Bunn, 27 Cal.4th 1, 17, 115 Cal.Rptr.2d 192, 204 (2002).

Citing an earlier United States Supreme Court case on separation of powers, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 211, 115 S.Ct. 1447,

1449 (1995), People vs. Bunn held: "[A] separation of powers violation occurs when postjudgment legislation deprives court decisions 'of the conclusive effect that they had when they were announced.' (Citation omitted) ***Thus, whether a statute targets particular suits or parties...the critical factor for separation of powers purposes is whether such impermissible legislative interference with final judgments has occurred.***" People v. Bunn, 27 Cal.4th at 21, 115 Cal.Rptr.2d at 207 - 208. (Emphasis added)

Before Proposition 8 was passed, the Supreme Court's opinion in In re Marriage Cases, 43 Cal.4th 757, 76 Cal.Rptr.3d 683 (2008) decided that definitions of marriage which draw a distinction between opposite-sex couples and same-sex couples to exclude the latter from marriage are unconstitutional. In reaching that decision, the Supreme Court held that under our State Constitution, (1) the right to marry is so integral to an individual's liberty and personal autonomy that it cannot be abrogated by the Legislature or by the electorate through the statutory initiative process, (2) that statutory definitions which restrict marriage to opposite sex couples treat persons differently on the basis of sexual orientation, (3) that sexual orientation is a suspect classification, and (4) that there is no compelling state interest in distinguishing between same-sex couples and opposite-sex

couples in terms of eligibility to marry.

Proposition 8, denies homosexuals, and only homosexuals, the same fundamental right to marry enjoyed by others. It therefore targets homosexuals, a suspect classification, for the denial of a fundamental right. It was enacted after our Supreme Court held that sexual orientation is a suspect classification, and, as a matter of constitutional law, that the fundamental right to marry cannot be abrogated by the Legislature or by the electorate through the statutory initiative process.

The only way that homosexuals can be denied equal protection with respect to an inalienable right (marriage as an aspect of privacy) is for the Marriage Cases opinion to be disregarded. Similarly, the only way that homosexuality can be a suspect classification, and yet serve as Proposition 8's criteria for denying the fundamental right to marry, is for the Marriage Cases opinion to be disregarded. Finally, the only way that a homosexual's right to marry the person of his choice can be immune from abrogation through the statutory initiative process, and yet abrogated by an initiative, is for the Marriage Cases opinion to be disregarded.

Proposition 8 can only stand if the Supreme Court's Marriage Cases opinion is ignored. Under any analysis or test, Proposition 8 abrogates the Supreme Court's role as the final arbiter of the Constitution's core values-

privacy, liberty and equal protection.[6] For these reasons, that initiative violates the separation of powers doctrine.

IV. RESPONSE TO QUESTION NO.3: PROPOSITION 8 HAS NO RETROACTIVE EFFECT

The Tyler-Olson Petitioners agree with the Attorney General's conclusion that Proposition 8 does not have retroactive effect, and with his analysis of the retroactivity issue.

V. CONCLUSION

Proposition 8 rips inalienable human rights out of the fabric of our Constitution. In doing so, it improperly intrudes upon and ultimately undermines the role of the Supreme Court as the guardian of the Constitution. This initiative is both an improper revision of the Constitution, and a brazen attempt to cut across the separation of powers that are constitutionally required in our State. For these reasons, Proposition 8 cannot stand.

---

[6] The cases cited in the Attorney General's brief do not deal with inalienable fundamental rights of an individual secured by the Constitution.

Dated: January 5, 2009

ALLRED, MAROKO & GOLDBERG
Attorneys for Petitioners Robin Tyler, Diane Olson, Cheri Schroeder & Coty Rafaely

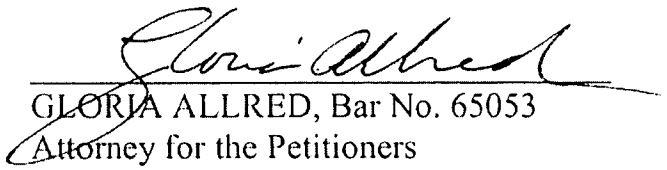
GLORIA ALLRED

MICHAEL MAROKO

JOHN STEVEN WEST

Rule 8.204(c)(1) Certificate of Compliance

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, counsel for the Respondents hereby certifies that the REPLY BRIEF OF THE TYLER-OLSON PETITIONERS REGARDING ISSUES SPECIFIED IN THE SUPREME COURT'S ORDER FILED NOVEMBER 19, 2008 is proportionately spaced, has a typeface of 13 points or more, and contains 6,895 words, including footnotes but excluding the Table of Contents, Table of Authorities and Certificate of Compliance, as calculated by using the word count feature in Corel WordPerfect X3.



GLORIA ALLRED, Bar No. 65053
Attorney for the Petitioners
ROBIN TYLER and DIANE OLSON,
CHERI SCHROEDER and
COTY RAFAELY

DECLARATION OF SERVICE

Case Name: **Robin Tyler et al. v. The State of California, et al.**

Case Number: **S168066**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 6300 Wilshire Boulevard, Suite 1500, Los Angeles, California 90048.

On **January 5, 2009**, I served the foregoing document described as **REPLY BRIEF OF THE TYLER-OLSON PETITIONERS REGARDING ISSUES SPECIFIED IN THE SUPREME COURT'S ORDER FILED NOVEMBER 19, 2008** on the interested parties in this action

[X] by placing [ ] the original [X] a true copy thereof enclosed in a sealed envelope addressed **as indicated on the attached Mailing List**

[X] **BY MAIL:** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

[ ] **BY PERSONAL SERVICE:** I caused such envelope to be hand-delivered to the offices of the addressee(s).

[ ] **BY FAX**: by transmitting a true copy via facsimile transmission from telecopier number (323) 653-1660 located at 6300 Wilshire Blvd., Ste. 1500, Los Angeles, California 90048, to the following:

Executed on January 5, 2009, at Los Angeles, California.

[X] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

JENNIFER SHUEMAKER

SIGNATURE

SERVICE LIST

<table>
<tr><td>Supreme Court of California
350 McAllister Street, Rm. 1295
San Francisco, CA 94102-4797
Tel: (415) 865-7000</td><td>Via email and Federal Express

(original + 13 copies)</td></tr>
<tr><td colspan="2">Via U.S. Mail</td></tr>
<tr><td>Edmund G. Brown, Jr.
Christopher E. Krueger
James M. Humes
Kimberly J. Graham
Manuel M. Mederios
Mark R. Beckington
David S. Chaney
Louis Muro
STATE OF CALIFORNIA
DEPT. OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
1300 I Street, Suite 125 [95814]
P.O. Box 944255
Sacramento, CA 94244-2550
Tel: 916-445-7385
Fax: 916-324-5567
Email:
Mark.Beckington@doj.ca.gov

Counsel for the State of California, Attorney General Bill Lockyer, and Michael Rodrian, State Registrar of Vital Services</td><td>Andrew P. Pugno
Timothy D. Chandler
LAW OFFICES OF ANDREW P. PUGNO
101 Parkshore Drive, Suite 100
Folsom, CA 95630-4726
Tel: 916-608-3065
Fax: 916-608-3066

- and -

Kenneth W. Starr
Attorney at Law
24569 Via De Casa
Malibu, CA 90265-3205
Tel: 310-506-4621
Fax: 310-506-4266

Counsel for Intervenors Dennis Hollingsworth, Gail J. Knight, Martin F. Gutierrez, Hak-Shing William Tam, Mark A. Jansson, and Protectmarriage.com; Proposition 22 Legal Defense and Education Fund</td></tr>
</table>

Rena M. Lindevaldsen **Mary E. McAlister** **LIBERTY COUNSEL** 100 Mountain View Road Suite 2775 Lynchburg, VA 24502-2272 Tel: 434-592-3369 Fax: 434-582-7019 *Counsel for Randy Thomasson and Campaign for California Families*	Matthew D. Staver **LIBERTY COUNSEL** 1055 Maitland Center Commons Second Floor Maitland, FL 32751-7214 Tel: 800-671-1776 Fax: 407-875-0770 *Counsel for Randy Thomasson and Campaign for California Families*